Pang Chee Meng v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-159-90
ABDUL HAMID OMAR LP, MOHAMED YUSOFF SCJ AND EUSOFF CHIN J
28 NOVEMBER 1991

Evidence *— Burden of proof — Duty of prosecution to prove guilt of accused — Burden on accused may be discharged on balance of probability and creating reasonable doubt — Whether information admissible under s 27 of Evidence Act 1950*

Evidence *— Information from accused while in police custody — Credibility of such evidence — Courts to be vigilant in ensuring credibility — Evidence Act 1950 s 27*

Criminal Law *— Trafficking in dangerous drug — Exclusive possession of room where drugs were found — Dangerous Drugs Act 1952 s 39B(1)*

In this case the appellant appealed against his conviction and sentence on a charge of trafficking in dangerous drugs. On appeal it was contended that (a) the learned judicial commissioner was wrong in admitting a statement made by the appellant in answer to the question put to him by a police inspector as information under s 27 of the Evidence Act 1950; (b) the learned judicial commissioner was wrong in not concluding that the room was not exclusively occupied by the appellant.

Held, allowing the appeal:

(1) In invoking s 27 of the Evidence Act 1950 the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of the section, which is so vulnerable to abuse. In this case the police evidence was unsatisfactory and created a lurking doubt on the thoroughness of the police investigation. In fact the admissibility of the evidence under s 27 was initially rejected by the court.

(2) In this case the trial judge had erroneously directed himself on the principles to be applied in determining issues of fact and law. The learned judicial commissioner adopted a wrong approach in regard to the burden of proof and seemed to expect a higher standard of proof from the defence than that of creating reasonable doubt.

(3) The learned judicial commissioner was manifestly wrong to find as a fact that the appellant had exclusive possession, when all the while his stand, in making the cautioned statement, had been that there were three others sharing the accommodation. There was some degree of corroboration in the the prosecution investigation to this contention.

(4) In the light of the material contradictions and the surrounding circumstances, the court was not satisfied that the prosecution

had proved exclusive custody and control of the drugs found in the room and the appeal should therefore be allowed.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah merayu terhadap sabitan dan hukuman ke atasnya atas tuduhan mengedar dadah berbahaya. Di dalam rayuan itu dihujahkan (1) bahawa yang arif pesuruhjaya kehakiman telah tersilap menerima pernyataan yang dibuat oleh perayu bagi menjawab soalan yang dikemukakan kepadanya oleh inspektor polis sebagai maklumat di bawah 27 Akta Keterangan 1950; (b) bahawa yang arif pesuruhjaya kehakiman tersilap tidak memutuskan bahawa bilik yang berkenaan tidak dididuduki oleh perayu secara eksklusif.

Diputuskan, meluluskan rayuan itu:

(1) Apabila merujuk kepada s 27 Akta Keterangan 1950 mahkamah hendaklah sangat berhati-hati supaya memastikan kebolehpercayaan keterangan yang diberi oleh pegawai polis mengenai seksyen itu, yang mana sangat mudah disalahgunakan. Di dalam kes ini keterangan yang diberi oleh pihak polis tidak memuaskan dan menimbulkan keraguan tersirat mengenai kesempurnaan penyiasatan polis. Pada hakikatnya pada awalnya penerimaan keterangan itu di bawah s 27 Akta itu telah tidak dibenarkan oleh mahkamah.

(2) Di dalam kes ini hakim perbicaraan yang arif telah tersilap mengarah dirinya mengenai prinsip-prinsip yang harus dikenakan di dalam memutuskan isu fakta dan undang-undang. Pesuruhjaya kehakiman yang arif itu telah mengikut pendekatan yang salah terhadap beban pembuktian dan nampaknya telah mengharapkan taraf pembuktian yang lebih tinggi daripada apa yang boleh menimbulkan keraguan yang munasabah dari orang yang dituduh.

(3) Yang arif pesuruhjaya kehakiman jelas telah tersilap apabila beliau berpendapat bahawa perayu mempunyai milikan eksklusif, sedangkan pendirian perayu itu apabila membuat pernyataan beramaran tetap adalah terdapat tiga orang lain yang tinggal bersama di tempat itu. Juga terdapat sedikit sebanyak sokongan mengenai perkara itu dari hasil penyiasatan polis.

(4) Memandangkan pertentangan yang penting dan keadaan sekeliling kes ini mahkamah tidak berpuashati bahawa pihak pendakwa telah membuktikan penjagaan dan kawalan eksklusif ke atas dadah yang terdapat di dalam bilik yang berkenaan dan oleh kerana itu rayuan hendaklah dibenarkan.]

Cases referred to

1 *Wai Chan Leong v PP* [1989] 3 MLJ 356 (refd)
2 *Woolmington v DPP* [1935] AC 462 (folld)
3 *R v Carr-Briant* (1943) 29 Cr App R 76 (folld)

Legislation referred to

Evidence Act 1950 s 27

Appeal from: Criminal Case No 58-10-88 (High Court, Kuala Lumpur).

Karpal Singh (*Karpal Singh & Co*) for the appellant.
CT Wong (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Abdul Hamid Omar LP (delivering the judgment of the court): This appeal by Pang Chee Meng is against his conviction and sentence by the learned judicial commissioner sitting at Kuala Lumpur on a charge as follows:

> Bahawa kamu pada 12 September 1987 jam lebih kurang 2.10 pagi di rumah No 13F Jalan Kalong off Jalan Sungei Besi, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan telah mengedar dadah berbahaya, iaitu 353.86g heroin dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama.

Mr Karpal Singh appearing on behalf of the appellant urged that the appeal be allowed and the conviction set aside principally on the ground that the learned judicial commissioner was wrong in admitting a statement made by the appellant in answer to a question put to him by Inspector Kamaruddin (PW1) as information admissible under s 27 of the Evidence Act 1950.

Mr Karpal Singh contended that (a) the said information had not been the subject of a contemporaneous record and (b) there were serious contradictions in the evidence of PW1 and PW6 in regard to the statement to justify the admission of such evidence as information leading to the discovery of the drug.

Three other subsidiary grounds were also raised:

> Firstly, the learned judicial commissioner was wrong in not concluding the room was not exclusively occupied by the appellant; secondly, in concluding the existence of Ah Seng and Ah Fatt as the other co-tenants of the room difficult to believe; thirdly, in drawing an adverse inference against the defence for failing to call the appellant's sister, Phang Sow Ying, as a witness.

The undisputed facts of the case are simple. Acting on information, the police laid an ambush for the accused near the place where the accused was known to be living. Upon arrest, the accused allegedly gave information to the police party which led to discovery of heroin, the subject matter of the charge. The drugs were found in a room he was known to be living in. At all times, after his arrest, the accused denied any knowledge of the drugs or that he gave any information. He maintained that he was not proficient in Bahasa and that he did not have exclusive possession of the room where the police found the drugs. In a cautioned statement following his arrest he named two persons sharing the room with him. Upon defence being called he chose to give evidence on oath and there appears nothing improbable with his version, whether true or not. Unfortunately, the trial was conducted rather haphazardly in that on some occasions inadmissible evidence was recorded although later rectified. The police investigation cannot be

said to be very satisfactory. As for the information given by the appellant, Inspector Kamaruddin (PW1) who initially introduced in evidence such information said that in reply to his question 'Di mana lu simpan itu dadah?' (Where do you keep the drugs?), the appellant replied, 'Saya simpan di bilek atas room saya.' (I keep in my room upstairs.) At this juncture the defence objected to the admissibility of the statement on the ground that as the appellant was under arrest and no caution was administered the statement was therefore not admissible. The learned judicial commissioner ruled in favour of the defence and held that the statement made by the appellant 'Saya simpan di bilek atas room saya' was not admissible. Subsequently, however, Inspector Kamaruddin was recalled by the prosecution and the information given by the appellant was again adduced and at that point of the proceedings the appellant is alleged to have said 'Itu barang tidak ada di kereta. Itu barang ada atas rumah.' (The things is not in the car. The thing is in the house upstairs.) However under cross-examination, Inspector Kamaruddin stated that the appellant's response to his question was 'Tiada di dalam kereta tetapi ada di rumah.' Thereafter the prosecution proceeded to adduce evidence from PW6 who said that he heard Inspector Kamaruddin asking the appellant about the drug and the reply was 'Dalam kereta tidak ada tetapi di rumah.' (It was not in the car but at the house.)

Upon careful perusal of the evidence of PW1 and PW6, we are of the view that there are serious contradictions in the information which allegedly came from the appellant and which the prosecution contended led to the discovery of the drugs in question. While the precise question put to the appellant is evident, the true substance of the information given by the appellant is not altogether clear in the light of the contradictions inherent in the prosecution evidence.

Consequently it makes determination of what precisely that information was intended to be conveyed by the appellant leading to the discovery of the drugs difficult.

The rationale behind this section revolves on the basis that if a fact is actually discovered in consequence of information given by the accused in custody some degree of guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence overriding the criminal procedure code and other written laws. The effect of interplay between this section and other provisions of law was clearly enunciated in the Supreme Court decision *Wai Chan Leong v PP*[1] where it was held that 'The word "information" in s 27, unlike a statement, includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.' While this section, an exception to other laws in the particular respect, is very useful to the detection of crimes, the founding fathers of jurisprudential textbooks on the Indian Evidence Act which is in pari materia with our Ordinance, have emphasized on the question of discovery that 'Section 27' has frequently been misused by the police and the courts should be vigilant about the circumvention of its provisions. The protection afforded by the wholesome provisions of ss 25 and 26 may sometimes be whittled down by the police by their ingenuity to get the information given by the accused recorded in the case diary in a way

it would appear that it led to the discovery of some facts although the police might have made such discovery from other sources. We are not suggesting that the practice by the local police is the same as in India, nevertheless, we are firmly of the view that in invoking s 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

One interesting question posed to us in this case is whether the High Court erred on this principle. For the determination of this appeal, we do not think it necessary to consider the attitude and finding of the learned judicial commissioner in isolation. Instead, it is sufficient for us to review the effect of the totality of his approach to the whole case. After studying his grounds of judgment, we are in doubt whether his approach was right in some respects especially with regard to the burden of proof. In this context, we have specially directed our mind to the notes of evidence which clearly show that:

(a) First prosecution witness, Inspector Kamaruddin bin Hj Abdul Rahman, admitted in evidence (p II) when he said: 'I agree there was a difference between my earlier statement and now.'

'I am not sure whether the room was occupied by more than one person taking into consideration there were two cupboards and various clothings.'

(b) PW5 Inspector Baharuddin bin Mohd Nordin stated: 'I was aware of two males named Ah Seng and Ah Fatt on my first visit to 13F.'

'I did not take fingerprints in the room to determine the existence of Ah Seng and Ah Fatt. I agree that if I have carried fingerprints dusting I would be able to determine the people in the room.' 'I did not ask for description of Ah Seng and Ah Fatt from sister of the accused or other persons.'

These scattered pieces of evidence create lurking doubt in our mind on the thoroughness of the police investigation. In the instant case the accused denied that he led the police to the discovery of the drugs and that in any event he did not have exclusive possessions of the room where the heroin was found, in that there were at least three others with access to the room, namely, Ah Seng, Ah Fatt and the accused's sister, Phang Sow Ying. And the disturbing feature in regard to the discovery was the admissibility of the evidence under s 27 that was initially rejected by the court.

With regard to the learned judicial commissioner's approach, one point to which we focussed our attention is 'Did he misdirect himself on the burden of proof in this case?' At the risk of repetition we wish to quote the time-honoured principles of English Law which we follow strictly, unless local circumstances and legislation dictate otherwise. In *Woolmington v DPP*[2] Lord Sankey said:

> Throughout the web of English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the person's guilt. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

In later cases it has been stated that a reasonable doubt is the sort of doubt that might affect the mind of a person in dealing with matters of importance in his own affairs. The required standard is less than 'certainty'. Later in *R v Carr-Briant*[3] amplifying the above principle it was stated at p 87 that:

> In any case where either by statute or at common law, some matter is presumed against an accused person unless contrary is proved the jury should be directed that the burden of proof required is a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury or the probability of that which the accused is called upon to establish.

Both the above principles have been reaffirmed by many cases in the UK and locally and we cannot do better than quote the original sources for the information of everyone in the profession.

In the present case, reading the grounds of judgment, we cannot escape the feeling that the trial judge erroneously directed himself as to the principles to be applied in determining various issues of fact and law. We are very reluctant to disturb a finding of fact by any trial judge except when he misdirected himself as to how to assess the evidence. Many of the expressions used in the grounds of judgment indicate that he apparently adopted the wrong approach. By saying so, we refrain from expressing any opinion as to the role of the accused or anybody else in the whole episode. It is sufficient for us to say that the defence of the accused was probable and more than adequate to rebut the case for the prosecution. To illustrate the approach of the learned judicial commissioner let us quote instances from his finding. He said 'once defence is called accused must testify and support his contention with evidence both from witnesses or otherwise that he is not guilty of the charge.' This sentence interpreted narrowly would mean that the trial judge expected a higher standard of proof from the defence than of creating a reasonable doubt. Whether the accused testifies or adopts other means is a matter of choice for him and his counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course. Having closely perused the evidence ourselves, we find it difficult to believe that the judicial commissioner's expression is merely a matter of style and language and not of substance. The learned judicial commissioner was manifestly wrong to find as a fact that the accused had exclusive possession when all the while his stand, when he made the cautioned statement, had been that there were three others sharing the accommodation. There is some degree of corroboration in the prosecution investigation to this contention. If some of these claimed witnesses cannot be traced, it was a combination of unhappy circumstances in this case. The accused cannot be penalized for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

In the light of the material contradictions and the circumstances surrounding we are not satisfied that the prosecution had proved exclusive custody and control of the drugs found in the room. We accordingly decided at the conclusion of hearing to allow the appeal and quash the conviction. Accordingly, the accused was discharged and acquitted.

Appeal allowed.

Reported by Prof Ahmad Ibrahim